1996

Flanders & Associates v. R. Duane Layton : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FLANDERS & ASSOCIATES,	:	
Plaintiff/Appellant,	:	Case No.960090-CA
vs.	:	Priority No. 15
R. DUANE LAYTON,	:	
Defendant/Appellee	:	

BRIEF OF APPELLEE

APPEAL FROM ORDER STRIKING PLAINTIFF'S COMPLAINT AND JUDGMENT BY DEFAULT OF THIRD CIRCUIT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable Stephen L. Henriod, Circuit Court Judge

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IN THE UTAH COURT OF APPEALS

FLANDERS & ASSOCIATES,	:	
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R. Duane Layton,	:	
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BRIEF OF APPELLEE

APPEAL FROM ORDER STRIKING PLAINTIFF'S COMPLAINT AND JUDGMENT BY DEFAULT OF THE THIRD CIRCUIT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable Stephen L. Henriod, Circuit Court Judge

R. Duane Layton ("Layton"), appellee herein, respectfully requests that this Court uphold the determination of the Third Circuit Court, the Honorable Stephen L. Henriod presiding, on such grounds as follow:

JURISDICTION OF THE APPELLATE COURT

The Court of Appeals has jurisdiction pursuant to § 78-2a-3(d), *Utah Code Annotated,* (1953, as amended).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Rule 60(b), *Utah Rules of Civil Procedure,* provides for the setting aside of the Trial Court's Order, which entered default against plaintiff, and which granted judgment to defendant on his counterclaim?

2. Whether failing to calendar and appear at a pretrial conference is a reason specified in Rule 60 (b), *Utah Rules of Civil Procedure,* e. g. mistake, inadvertence, surprise, or excusable neglect?

3. Whether the sanctions entered against Flanders & Associates were an appropriate remedy in light of the failure to appear at a properly noticed pretrial conference and Rule 16(d), *Utah Rules of Civil Procedure?*

4. Is this appeal frivolous or brought for purpose of delay? Should damages be awarded to Layton?

THE STANDARD OF APPELLATE REVIEW

For any question of fact, the standard of review in this appellate proceeding is abuse of discretion.

The Circuit Court's decision regarding denial of the Motion to Set Aside is reviewed under an abuse of discretion standard, *Katz v. Pierce,* et al, 732 P.2d 92 (Utah 1986).

STATUTES AND RULES WHOSE INTERPRETATION IS OF CENTRAL IMPORTANCE

Rule 16. Pretrial conferences, scheduling, and management conferences

> **(d) Sanctions.** If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to

participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. (Amended effective Jan. 1, 1987.)

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said actions; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41 (b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;
(2) by consent in writing, filed in the cause;
(3) by oral consent in open court, entered in the minutes.

STATEMENT OF THE CASE

Nature of the Case

This appeal is taken from the Order Striking Plaintiff's Complaint and Judgment by Default, including but not limited to, the Court's Disposition Summary that denied Appellant's Motion to Set Aside Judgment, which was entered on December 15, 1995. There have not been any motions filed pursuant to Rules (50)(a) and (b), 52(b), 54(b), or 59 of the *Utah Rules of Civil Procedure.*

Course of Proceedings

The Statement of Course of Proceedings in Appellant's brief is correct with the addition of the following to be included in Paragraph 7.

. . . 7. A pre-trial settlement conference was scheduled by the Court on September 19, 1995, at 9:30 a.m. Notice was sent to both parties. R. 23. Layton appeared and F & A failed to appear at said pre-trial conference. The Court imposed sanctions. R. 26.. . .

STATEMENT OF FACTS

1. On April 11, 1995, F & A, filed a complaint against Duane Layton ("Layton") for breaching a representation agreement regarding legal services. R. 1.

2. On May 12, 1995, Layton filed an Answer and Counterclaim. R. 9.

3. On May 31, 1995, F & A filed a Reply to Counterclaim. R. 14.

4. On July 26, 1995, F & A filed a Certificate of Readiness for Trial. R. 18.

5. On or about August 7, 1995, Layton filed an Objection to Readiness for Trial R. 21.

6. On August 8, 1995, F & A filed its Response to Objection to Readiness for Trial. R. 24.

7. A pre-trial settlement conference was scheduled by the Court on September 19, 1995, at 9:30 a.m. Notice was sent to both parties. R. 23. (Exhibit A).

8. Layton appeared at the pretrial, and F & A failed to appear. The Court imposed sanctions by Striking F & A's Complaint and entering default on Layton's Counterclaim. R. 26.

9. On October 5, 1995, the Court entered the Order Striking Plaintiff's Complaint and Judgment by Default. R. 28.

10. As a result of the lack of appearance by F & A, the Court ordered that F & A's Complaint be stricken and dismissed with prejudice for failure to appear and entered a default judgment on the Counterclaim against F & A, in the approximate amount of $2,000.00. R. 35.

11. The Disposition Summary was rendered on December 15, 1995, which found no factual basis for alleged application of the rule. R 149. (Exhibit B)

12. F & A filed a Motion to Set Aside Judgment. R. 33.

13. The Court denied the Motion to Set Aside. R. 149.

SUMMARY OF ARGUMENTS

1. F & A's failure to appear at the properly noticed pretrial conference was not mistake, inadvertence or excusable neglect under Rule 60(b) and the trial court did not err in denying the motion to set aside the judgment filed.

2. Trial courts are vested with considerable discretion to grant or deny Motions to Set Aside Default Judgments.

3. The sanctions ordered by the trial court for F & A failure to appear at the properly noticed pretrial conference were an appropriate exercise of judicial discretion pursuant to Rule 16 (d) *Utah Rules of Civil Procedure.*

4. No findings were required under Rule 52 *Utah Rules of Civil Procedure*. The circuit court judge had no duty to find facts upon all material issues submitted for decision because the findings were waived pursuant to Rule 52(c)(1) by F & A's failure to appear and default.

5. F & A is responsible for calendaring and attending pre-trial and cannot claim excusable neglect because of employees actions or failure to act.

6. Injustice and inequity to Layton shall result should F & A's Motion to Set Aside the Default be granted.

7. This Appeal is frivolous or brought for purpose of delay as defined under Rule 33, *Utah Rules of Appellate Procedure.*

ARGUMENT I

THE CIRCUIT COURT APPROPRIATELY DENIED THE MOTION TO SET ASIDE THE DEFAULT JUDGMENT

It was not an abuse of discretion for the trial court to refuse to set aside the Default and Default Judgment under the factual circumstances present here.

No substantial dispute exists as to the events which led to the entry of the Default, the Default Judgment and the striking of F & A's complaint. F & A failed to appear at a properly noticed pretrial conference. Rule 60(b), *Utah Rules of Civil Procedure*, provides that

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons; (1) mistake, inadvertence, surprise, or excusable neglect;. . .(7) any other reason justifying relief from the operation of the judgment.

The law in this jurisdiction relating to the standard of review on the refusal of a trial court to set aside a default judgment is well settled. *Airkin Intermountain, Inc. v Parker*, 30 Utah 2d 65, 513 P. 2d 429 (1973), contains a succinct expression of that standard. In that opinion, the court states:

> For this court to overturn the discretion of the lower court in refusing to vacate a valid judgment, the requirement of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded to him or his legal representative. The movant must show that he used due diligence and that he was precluded from appearing by circumstances over which he had not control. (Citation omitted, emphasis in original).

The only excuse for the failure to appear offered by F & A was that they were experiencing a staffing change and that the matter was not properly calendared. This is neglect, but not excusable neglect as required by the rule. The trial court in denying F & A's Motion to Set Aside the Default Judgment and stating that "no factual basis alleged for application of the rule," determined that F & A had not used due diligence and that F & A was not prevented by circumstances over which it had no control. [Exhibit B].

When a motion to vacate a default judgment is based on excusable neglect, trial court must consider and resolve question of excusable neglect prior to it consideration of issue whether meritorious defense exists; furthermore, it is unnecessary, and moreover inappropriate to even consider issue of meritorious defense unless court is satisfied that sufficient excuse has been

shown. *State By and Through Utah State Dept of Social Services v. Musselman*, 667 P. 2d 1053 (Utah 1983).

F & A's Brief in ARGUMENT IV and the ADDENDUM attempts to address the issue of meritorious defense, none of which should be considered on this appeal because the *Musselman* standard has not been met.

ARGUMENT II

TRIAL COURTS ARE VESTED WITH CONSIDERABLE DISCRETION TO GRANT OR DENY MOTIONS TO SET ASIDE DEFAULT JUDGMENTS.

This court has recently recognized the trial court's discretionary power in the case of *Miller v. Brocksmith*, 825 P. 2d 690 (Utah App. 1992). This court held "A trial court's ruling on a motion to set aside a default involves the trial court's discretionary power, and we will not disturb the trial court's decision in such matters absent a clear abuse of such discretion." at p. 693.

The Utah Supreme Court addressed this issue in *Katz v. Pierce, et al*, 732 P. 2d 92 (Utah 1986) and held as follows:

> The District court judge is vested with considerable discretion under Rule 60(b) in granting or denying a motion to set aside a judgment. *State ex rel. Utah State Department of Social Services v. Musselman,* 667 p 2d 1053 (Utah 1983); *Airken Intermountain, Inc v. Parker,* 30 Utah 2d 65, 513 P. 2d 429 (1973). The court should be generally indulgent toward setting a judgment aside where there is reasonable justification or excuse for the defendant's failure to answer and when timely application is made. Where there is doubt about whether a default should be set aside, that doubt should be resolved in favor of doing so. But, before we will interfere with the trial court's exercise of discretion, abuse of that discretion must be clearly shown. *Russell v. Martell,* 681 P. 2d 1193 (Utah 1984). That some basis may exist to set aside the default does not require the conclusion that the court abused its discretion in refusing to do so when facts and circumstances

support the refusal. *Cf. Wilson v. Miller,* 198 Kan. 321, 424 P.2d 271, 273 (1967) at p. 93.

The decision of the trial court does not exhibit an abuse of discretion that would justify reversal. The trial court's decision exhibits an appropriate exercise of discretion consistent with the controlling principle adopted by this court.

ARGUMENT III

THE CIRCUIT COURT PROPERLY IMPOSED SANCTIONS UNDER RULE 16 OF THE UTAH RULES OF CIVIL PROCEDURE

The undisputed facts show that this is simply a case involving a failure to attend a properly noticed pretrial conference and the imposition of sanctions as provided for in Rule 16 (d), Utah Rules of Civil Procedure, which states as follows:

> If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b) (2) (B), (C), (D). . . .

The sanctions imposed by the court on F & A in this matter were to strike its complaint and to enter a default on Layton's counterclaim both of which are specifically provided for in Rule 37(b)(2) (C), *Utah Rules of Civil Procedure* as follows: "(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;"

Although these sanctions of striking the complaint of F & A and entering judgment by default on Layton's counterclaim are severe penalties, this is not an abuse of the courts discretion. Generally courts have been reluctant to impose such harsh penalties because to do so unduly

penalizes a litigant for the neglect or omission of his attorney. However, in this case the attorney and the litigant are one in the same and no inequity or injustice results.

F & A argues that striking its complaint was a dismissal under Rule 41 (b) of the *Utah Rules of Civil Procedure*. It was not. As stated above the striking of the complaint and the entry of default and default judgment were an appropriate exercise of the courts authority under Rule 16.

ARGUMENT IV

NO FINDINGS ARE REQUIRED UNDER RULE 52 UTAH RULES OF CIVIL PROCEDURE

F & A argue that failure of the trial court to make findings of all material issues is reversible error, and relies upon Rule 52, *Utah Rules of Civil Procedure* for this proposition. However, the language of Rule 52(c) (1) is dispositive of this issue. It states as follows: "(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact: (1) by default or by failing to appear at the trial;"

F & A's failure to appear at the pretrial and the entry of the default waived any requirement for findings if findings were required which we believe they were not.

ARGUMENT V

ATTORNEY IS RESPONSIBLE FOR ACTS OF EMPLOYEES

The only excuse that F & A has raised for failing to appear at the properly noticed pretrial conference is that they were experiencing some staffing changes and the secretary did not get this hearing on its calendar.

It is well established that work done by secretaries and other lay persons is done as agents of the lawyer employing them and the lawyer must supervise their work and be responsible for their work product or lack of it. *State v. Caenen*, 235 Kan. 451, 681 P. 2d 639 (1984).

Although negligence on part of counsel may, in appropriate cases, be deemed "excusable neglect" for purpose of setting aside default judgment, negligence on part of one of the parties or its employees cannot be excused. *Wagner Equipment Co. v. Mountain states Mineral Enterprises, Inc.,* 669 P. 2d 625 (Colo. App 1983). F & A may use this as an excuse, but it does not rise to the level of "excusable neglect" or "inadvertence" as required by law to set aside a default under Rule 60(b), *Utah Rules of Civil Procedure.*

ARGUMENT VI

INJUSTICE AND INEQUITY TO LAYTON SHALL RESULT SHOULD F & A'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT BE GRANTED.

Layton appeared in the trial court Pro Se, and has until this Brief attempted to represent himself against F & A, licensed attorneys. However, due to the complexities of the Rules of Appellate Procedure and this court, Layton has been forced to obtain counsel to assist with finally resolving this matter at this court.

It would be patently unfair to allow an attorney to continue to harass and cause undue emotional and financial hardship upon a prior client by setting aside this judgment. The facts in this matter are clear. Layton took time off from work to appear and the attorneys (F & A) failed to appear at a pretrial conference. Both parties had notice of the consequences of their failure to appear and must be subject to the sanctions imposed. To do otherwise would be an injustice and inequity to Layton.

ARGUMENT VII

THIS APPEAL IS FRIVOLOUS OR FOR PURPOSE OF DELAY, AS DEFINED UNDER RULE 33, *UTAH RULES OF APPELLATE PROCEDURE*

It is apparent from the undisputed facts that this appeal is not grounded in fact. Further, the existing law is clear in this area and F & A has not made arguments, good faith or otherwise, to extend, modify, or reverse the existing law. It appears this appeal has been brought to further harass Layton, delay his judgment and collection thereof, to gain an unfair advantage of a pro se litigant (Layton), and to increase Layton's costs of litigation. All of which are inappropriate purposes under Rule 33, *Utah Rules of Appellate Procedure.* Accordingly, Layton respectfully requests that the court award damages for double the costs allowed under the provisions of Rule 34, *Utah Rules of Appellate Procedure.*

CONCLUSION

F & A has not satisfied the requirements of Rule 60(b), *Utah Rules of Civil Procedure.* Counsels failure to appear at the properly noticed pretrial conference was not inadvertence or excusable neglect. To allow an attorney to avoid their legal responsibilities and then seek to set aside judgments at this court constitutes a great injustice to Layton and should not be granted.

The Circuit Court did not commit reversible error by not entering findings in this matter. This appeal is frivolous and brought for purposes of delay only and damages should be awarded.

WHEREFORE, Layton respectfully requests that this Court uphold the denial of the Motion to Set Aside Judgment, and award Layton attorneys fees, damages and costs to defend this action and grant such further relief as the court deems just and proper.

DATED this 12th day of July, 1996.

SHAUNA L. KERR
ATTORNEY AT LAW

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 1996, I served the foregoing Brief of Appellee on the following, by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

BRENDA L. FLANDERS
FLANDERS & ASSOCIATES
56 East Broadway, Suite 400
Salt Lake city, Utah 84111

Flanders and Associates
Plaintiff

VS.

R. Duane Layton
Defendant

ORDER FOR PRE-TRIAL SETTLEMENT CONFERENCE AND FOR APPEARANCE OF COUNSEL
(read carefully)

CIVIL NO. 950004210CV

Honorable Judge Stephen L. Henriod

The court, on its own motion, hereby orders that a *pre-trial settlement conference* be held in the above entitled case as follows:

DATE: September 19, 1995 TIME: 9:30 am.

PLACE: *Third Circuit Court, S.L. Dept. Fifth Floor, Judges chambers*

ADDRESS: *451 South 200 East SLC, Ut 84111*

IT IS FURTHER ORDERED THAT ALL COUNSEL OF RECORD BE IN ATTENDANCE UNLESS PRIOR TO SAID CONFERENCE, THE COURT EXCUSES THE APPEARANCE OF ANY PARTY, THIS INCLUDES DEFENDANTS WHO ARE REPRESENTED BY INSURANCE COMPANY COUNSEL. Corporate parties should be represented by a responsible officer authorized to personally make decisions for the settlement of the case. The attorney who will try the case shall attend unless excused for good cause shown. Every attorney has a duty to be thoroughly familiar with the relevant evidence and must be authorized to personally settle the case.

If counsel(s) are unable to meet the scheduled time, the counsel(s) are directed to contact the Judge or his/her clerk as soon as the fact is known and a time convenient to all will be arranged. The responsibility of contacting other parties receiving the notice to arrange such a change in schedule will be that of the person requesting the change.

The purpose of the conference is to effect a settlement of the case. Attorney's are directed to discuss settlement with their clients and each other prior to the appearance at the settlement conference, to be realistic in their approach to settlement and to be prepared to advise the Judge of their efforts towards settlement and the problems involved. If a settlement is agreed upon prior to the conference, counsel is directed to prepare a stipulation of settlement to present at or prior to the conference, or to appear and present such settlement into the record.

Other problems such as withdrawal of counsel, failure to respond to discovery, witness problems, trial conflict, requests for continuances, etc., will be resolved at the conference. Motions for summary judgment will not be heard.

If counsel fails to appear or it settlement efforts are thwarted by the non-appearance of a party, attorney's fee may be allowed to opposing parties and the *court may enter a default against the non-appearing party or what ever other sanctions seem just and appropriate.*

Copies of this notice were mailed to the following parties at the addresses indicated:

DATED: August 9, 1995 BY: Leona Kirk

Brenda L. Flanders
Dena C. Sarandos
36 East Broadway, Suite 400
Salt Lake City, UT 84111

R. Duane Layton
P.O. Box 4335

Exhibit A

THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

DISPOSITION SUMMARY

Case# 950004210 CV

The ☒ plaintiffs ☐ defendants

Motion for/to Set Aside Judgment has been decided as follows:

☒ Denied ☐ Granted

☐ ATP/PLA to prepare order ☐ ATD/DEF to prepare order

Comments: no factual basis alleged for application of the rule.

Date: 12/15/95

Stephen L. Henriod
Third Circuit Court Judge

STATE OF UTAH:
County of Salt Lake: ss.
I, the undersigned, Clerk of the Circuit Court, State of Utah, Salt Lake County, Salt Lake Department do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such clerk.
Witness my hand and seal of said Court This 26 day of January 19 96
PAUL L. VANCE, Clerk
Deputy

Exhibit B